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alcohol law for Canadians

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# INFORMATION REVIEW

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## A GUIDE TO DRUG AND ALCOHOL LAW FOR CANADIANS

This guide was prepared by Carol McDermott an information specialist with the Addiction Research Foundation, in consultation with Robert Solomon, associate professor of law at the University of Western Ontario and legal consultant to the Addiction Research Foundation.

It has been reviewed and verified with respect to scientific content by the Foundation's Scientific Review Panel.



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## I. INTRODUCTION

Alcohol and other drugs are such a part of everyday life that it is easy to forget their potentially damaging effects. There are many laws that attempt to protect people from the harm which may result from imprudent use of alcohol or other drugs. Possible health, social, and legal consequences must be considered when making a decision about the use of any drug. This booklet will provide an introduction to the most common alcohol and other drug laws. It is intended to provide the layperson with knowledge for responsible decision-making; it should not be used as a legal self-help manual.

The first half of the booklet outlines the laws most relevant to alcohol and other drugs. These are presented in the context of general principles of Canadian law followed by more specific descriptions of the Narcotic Control Act and the Food and Drugs Act. Some of the substances subject to the controls of the two Acts are listed. The common drug offences are defined, followed by charts detailing the corresponding maximum penalties. Following the discussion of the drug legislation, federal laws governing alcohol are described, including the drinking/driving offences set out in the Criminal Code. Ontario's provincial alcohol laws are examined to provide an example of provincial alcohol legislation.

The second half of the booklet details some of the issues which arise from the enforcement of alcohol and drug laws. These subjects include police powers of arrest, search and seizure, sentencing options, and the possible consequences of a criminal record.

The final section describes the special considerations applicable to young people in trouble with the law.

The British North America Act, 1867 (renamed the Constitution Act, 1867), one of the most important written parts of Canada's constitution, divides responsibility for enacting legislation between the federal and the provincial governments.



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In very general terms, the federal government is given the authority to pass laws on most matters of national importance, including criminal law. The power to pass laws governing matters of a local nature is granted to the provinces. Each government, federal and provincial, passes laws in the form of acts or statutes which set out the laws and usually empower a particular authority to pass regulations containing details not specified in the act or statute.

Violation of the provisions of any statute is an offence. However, there is an important distinction between federal and provincial offences. Breach of the provisions of a federal statute is a criminal offence. Violation of a provincial statute is not a criminal offence. Although both criminal and provincial offences may be punishable by fines and/or imprisonment, only individuals convicted of a federal criminal offence acquire what is generally termed a "criminal record." Conviction for a provincial offence will result in a record of some kind, but it will usually be held only by provincial agencies and will not necessarily result in the negative consequences of a criminal record.

The main body of criminal legislation is set out in the Criminal Code. However, there are many other federal statutes which may be violated by alcohol or other drug involvement. Examples include the Customs Act, which among other things prohibits the importation of undeclared liquor across the border, and the Excise Act, which stipulates that a licence is required to make beer or liquor commercially.

The Criminal Code sets out crimes not included in other federal statutes, and provides administrative, enforcement, and sentencing provisions and defences. Through the Interpretation Act, many of the Criminal Code provisions apply to offences falling under other federal statutes--for example, offences under the Narcotic Control Act and the Food and Drugs Act, except when these Acts specifically provide contrary administrative, enforcement, or sentencing provisions.

Certain drug offences fall directly under the Criminal Code. These include causing a disturbance by being drunk in or near a public place



while not in a dwelling, and habitual drunkenness in the home of a child, thereby endangering the morals of the child or making the home an unfit place for the child. The Criminal Code also sets out three separate kinds of offences related to alcohol or other drugs and driving (see p.12).

The Criminal Code basically divides crimes into two categories according to the formality of the procedures used in trying the offences. Offences are divided into those punishable on summary conviction and those prosecuted by indictment. There is a third category, hybrid offences, in which the prosecutor is given the option of proceeding either by way of summary conviction or indictment. Although the distinction between the types of offences is based on the way in which each is tried, indictable offences usually carry more serious penalties than those tried by summary conviction.

## II. DRUG LAWS

Laws which control and/or prohibit drug use are contained in two federal statutes: the Narcotic Control Act and the Food and Drugs Act. An appendix (schedule) to the Narcotic Control Act lists the illegal substances. Three of the eight schedules appended to the Food and Drugs Act classify drugs according to the degree of control exerted over them by the Act.

### Narcotic Control Act

Before the introduction of the first Canadian criminal drug legislation in 1908, there were few restrictions on drug use. The importation and manufacture of opium was legal and, in fact, provided the government with revenue through taxation. Many responsible citizens were addicted to patent medicines containing opium or other drugs. However, changes in economic and political conditions, combined with anti-Asiatic sentiments, focused public attention on Chinese opium smoking. The Opium Act,



passed in 1908, was directed at the Chinese opium trade and contained the first federal criminal prohibition. It made the importing, manufacturing, offering to sell, selling, or possession for sale of opium for non-medical purposes, criminal offences. Although the first Act was repealed and replaced eventually by more comprehensive and severe legislation, the present Narcotic Control Act does bear a resemblance to its earlier predecessors. The Act still prescribes severe penalties and grants strong enforcement powers. However, the scope of the legislation has increased considerably. New offences, such as possession and cultivation, have been added and the definitions of others have been extended. As new substances became subject to abuse, they were added to the schedule of the Narcotic Control Act. Thus, morphine, cocaine, heroin, codeine, cannabis, and phencyclidine, among others, are now included in the schedule. These substances are defined as narcotics for legal purposes, irrespective of their pharmacological classification.

Cannabis was added to the Narcotic Control Act's schedule in 1923. Conviction for cannabis possession is a criminal offence which automatically results in a criminal record along with possible fines and/or imprisonment.

In addition to possession, the other common offences under the Narcotic Control Act are: possession for the purposes of trafficking; trafficking; importing; exporting; and cultivation. The offence commonly called "double-doctoring"--i.e. obtaining prescriptions for the same drug from different doctors--is set out in the regulations attached to the Act.

### Food and Drugs Act

The Food and Drugs Act is a federal statute that regulates the production and availability of a variety of foods, medical devices, cosmetics, and drugs. Although most of the drugs governed by this act have valid medical applications when used according to a physician's directions, they can be dangerous when misused. They are available only on prescription. Three of the schedules attached to the act and regulations--schedules F,



G, and H--include drugs which are used for non-medical purposes because of their psychoactive (mind-altering) properties.

(i) Schedule F

Some of the many substances included in this schedule have stimulating effects similar to those of the amphetamines or "uppers," while others have sedating effects similar to those of barbiturates. Tranquillizers such as Valium® and Librium® are also included in this schedule. Although these substances are legally available to the public by prescription only, unauthorized possession of Schedule F drugs is not an offence. Unauthorized sale is, however, a criminal offence.

(ii) Schedule G

Schedule G is a list of "controlled drugs"--mostly amphetamines, barbiturates, and related drugs. As with Schedule F drugs, these substances have valid medical uses but are also subject to abuse because of their psychoactive properties. Since many of these drugs can be very dangerous when taken other than in a controlled therapeutic dosage, they are available by prescription only. The Regulations also control the circumstances under which these drugs may be prescribed and the manner in which they may be dispensed. Although possession is not an offence, trafficking (which includes importing and exporting) in controlled drugs and possession for the purpose of trafficking are criminal offences.

(iii) Schedule H

Schedule H lists the "restricted drugs." None of them has medical uses except for research. Many of them, however, are used illegally for their hallucinogenic effects, such as LSD, MDA, STP (DOM). They can be very dangerous and are therefore not legally available to the public. Possession, possession for the purpose of trafficking, and trafficking (which includes importing and exporting) in restricted drugs are criminal offences.



## Common Drug Offences

### (i) Possession

A conviction for possession basically requires that the prosecution establish that the accused knowingly possessed the drug and had some measure of control over it. These criteria may be applicable in a wide variety of circumstances.

One need not have a drug on one's person or in one's home or car to be found guilty. Having control over a drug which is in some other place or in someone else's custody may also constitute grounds for a charge of possession. Under certain circumstances, joint possession charges may be laid against all group members if an individual in the group has an illicit substance with the knowledge and consent of the other members.

The charge of possession is for the actual illicit substance, not the unlawful drug the suspect believes it to be. Therefore, having a drug thought to be LSD, an offence under the Food and Drugs Act, could, in fact, lead to the relatively more serious charge of possession under the Narcotic Control Act, if the substance proved to be PCP. No minimum quantity is specified for possession. Thus, for example, having a very small vial of hash oil could lead to a charge of possession. Having a quantity larger than would seem likely for personal use, could lead to the relatively more serious charge of possession for the purpose of trafficking.

### (ii) Trafficking

Trafficking is defined differently by two major federal drug acts. The Narcotic Control Act defines trafficking as: manufacturing, selling, giving, administering, transporting, sending, delivering, or distributing the substances included in the schedule to the Act. Offering to perform any of these actions also constitutes grounds for a charge of trafficking. Importing, exporting, and cultivation of narcotics are separate offences.



**NARCOTIC CONTROL ACT**

Possession of Narcotics

hybrid offence tried by

<i>Maximum Penalty</i>	<i>Summary Conviction first (offence)</i>	<i>subsequent</i>	<i>Indictment</i>
Fine and/or Imprisonment	\$1,000 6 months	\$2,000 1 year	7 years

**FOOD AND DRUGS ACT**

Possession of Schedule F or G Drugs

Not an offence

Possession of Schedule H (Restricted) Drugs

hybrid offence tried by

<i>Maximum Penalty</i>	<i>Summary Conviction first (offence)</i>	<i>subsequent</i>	<i>Indictment</i>
Fine and/or Imprisonment	\$1,000 6 months	\$2,000 1 year	\$5,000 3 years



Trafficking in controlled or restricted drugs is defined by the Food and Drugs Act as: manufacturing, selling, transporting, delivering, as well as exporting from or importing to Canada any Schedule G or Schedule H drugs.

A difference between the actual drug and what it is thought to be is treated differently depending on whether the charge is for trafficking or for possession. The drug specified in a trafficking charge, under the Narcotic Control Act and the Food and Drugs Act, is the substance it is held out to be, not its actual content. Thus, the sale of oregano, held out to be marijuana, constitutes trafficking in a narcotic, even though it may not contain any illegal ingredient.

### (iii) Possession for the Purpose of Trafficking

Although a charge of possession for the purpose of trafficking may result from having more of a drug than would seem normal for personal use, it is not the only way to be charged with this offence. Even a very small amount of a drug, along with evidence that suggests it was for other than personal use, may be grounds for this charge. Scales, bags, lists of names, or even the accused's statement which indicates that the drug was for other than personal use may be used as evidence. It is not always necessary for the police to prove that the substance was intended for sale. For example, under the Narcotic Control Act, possession for "sharing" or "giving it away" constitutes possession for the purpose of trafficking.

### (iv) Importing and Exporting

Although included in the definitions of trafficking by the Food and Drugs Act, importing and exporting constitutes a separate offence under the Narcotic Control Act. This offence consists of transporting across the Canadian border any drug included in the schedule appended to the Narcotic Control Act. A person need not physically transfer the substance across the border; arranging for its movement is sufficient grounds for an importing and exporting charge. This offence carries a minimum penalty of seven years' imprisonment, and a maximum of life.



NARCOTIC CONTROL ACT

Trafficking or Possession for the Purpose of Trafficking in Narcotics

<i>Procedure</i>	<i>Indictment</i>
Maximum Penalty	Life Imprisonment

FOOD AND DRUGS ACT

Selling Schedule F  
hybrid offence tried by

<i>Maximum Penalty</i>	<i>Summary Conviction</i> first (offence)	<i>subsequent</i>	<i>Indictment</i>
Fine and/or Imprisonment	\$500 3 months	\$1,000 6 months	\$5,000 3 years

Trafficking or Possession for the Purpose of Trafficking in  
Schedule G (Controlled) Drugs

hybrid offence tried by

<i>Maximum Penalty</i>	<i>Summary Conviction</i>	<i>Indictment</i>
Imprisonment	18 months	10 years

Trafficking or Possession for the Purpose of Trafficking in  
Schedule H (Restricted) Drugs

hybrid offence tried by

<i>Maximum Penalty</i>	<i>Summary Conviction</i>	<i>Indictment</i>
Imprisonment	18 months	10 years



(v) Cultivation

The unauthorized growing of marijuana or opium poppy (both subject to the provisions of the Narcotic Control Act) constitutes the indictable offence of cultivation which is subject to a maximum sentence of seven years' incarceration. The suspect must be proven to have known what the substance was and have exerted some control over its growth. Thus, if a suspect is found in possession of marijuana seeds, unplanted, a charge of possession could result. If, however, the seeds were planted and tended, a charge of cultivation could be laid.

(vi) Prescription Shopping

Although narcotics having valid medical uses are available to the public by prescription, access to them is carefully controlled. The regulations to the Narcotic Control Act stipulate that anyone who asks for, or actually receives a narcotic (or a prescription for one) must disclose to the doctor the particulars of any narcotics (or prescriptions for them) received from a different doctor within the previous 30 days. Failure to do so is a summary conviction offence colloquially called "prescription shopping" or "double doctoring," which is subject to a maximum sentence of a \$500 fine and six months' imprisonment.

**DOUBLE DOCTORING OR PRESCRIPTION SHOPPING**

Procedure	Summary Conviction
Maximum Penalty	Fine \$500 and/or 6 months' imprisonment



### III. ALCOHOL LEGISLATION

#### Federal Alcohol Legislation

##### (i) Customs Act

The Customs Act, a federal statute, requires that everything acquired outside the country be declared upon re-entry. The Act also sets out the conditions under which certain kinds and amounts of goods intended for personal or household use, or as souvenirs or gifts, may qualify as duty-free. After at least 48 hours' absence from the country, goods up to a value of \$10 may be brought in duty-free upon oral declaration. This exemption may be claimed any number of times throughout the year. Once every calendar quarter, goods up to the value of \$50 are duty-free. A written declaration may be required. After seven days' absence, once every calendar year, goods up to a value of \$150 may be duty-free upon a written declaration. Part of the quarterly or yearly exemptions may be used for alcohol, subject to the following conditions. A maximum of 1.1 litres (40 oz) of wine or liquor, or 24 x 12 oz cans or bottles (or its equivalent--8.2 litres or 288 oz) of beer or ale may be declared at one time. This exemption is available only to people who have attained the legal drinking age in the province through which entry to the country is made. All alcoholic beverages must be carried in hand or in checked luggage.

Violation of this statute is a criminal offence. Failing to declare goods or making false declarations, may result in seizure and forfeiture of the goods and the vehicle (or boat or aircraft) in which they were transported. In addition, conviction for a charge of smuggling may result in a fine and/or imprisonment. The convicted offender also acquires a criminal record.

##### (ii) Excise Act

Federal controls over licensing of breweries and distilleries are set out in the Excise Act. The import or export of alcoholic beverages or equipment used to produce alcohol is also controlled by this Act.



### (iii) The Criminal Code Drinking and Driving Offences

In addition to the many other offences in which alcohol or other drugs may play a part, the Criminal Code sets out three separate kinds of offences which may arise from driving while under the influence of alcohol and/or other drugs. For all three offences, a charge can be laid if the person is in "care or control" of a motor vehicle (e.g. cars, trucks, vans, snowmobiles). Generally, entering a vehicle with the intent to drive constitutes care or control. Although it is generally expected that such vehicles are capable of being driven, they need not, at the time of the offence, be in motion or even in operable condition.

*Impaired Driving.* Driving, or having care or control of a motor vehicle, while impaired by alcohol or another drug is a criminal offence. The key issue for this offence is impaired ability, not the amount of alcohol or other drug consumed nor the actual driving exhibited. Impairment may be established by standard tests of coordination and perception, or by slurred speech or alcoholic breath odor. The amount of alcohol or other drug that may produce impairment varies from person to person. Such factors as weight, amount of fat tissue, age, sex, general level of health, hunger, emotional state, drinking history, and driving experience all interact, with the result that an individual may become impaired after consuming a relatively small quantity of alcohol or other drugs while someone else may have a higher tolerance. It is not a defence to this charge that your blood alcohol level was .08% or below. Theoretically, someone could be found guilty of impaired driving after drinking one beer. Non-medical drugs such as marijuana, or prescription drugs and over-the-counter medications such as cold remedies and cough syrups can also produce impairment, especially if taken in combination with alcohol. Inhalants, such as solvents and glues, which are not legally prohibited, may also cause impairment. Similar Criminal Code legislation applies to the navigation, care, or control of vessels while impaired.

*Blood Alcohol Level.* A separate offence is that of driving or having care or control of a vehicle or vessel while having a blood alcohol level (BAL) of



more than .08%. In general, it takes the "average person"\*\* over one hour to metabolize one standard drink\*\*. However, because of the many factors which influence the body's ability to metabolize alcohol, it is difficult to accurately predict alcohol levels on the basis of the amount drunk. The presence of more than 80 milligrams of alcohol in 100 millilitres of blood while driving or having care or control of a vehicle or vessel determines guilt for this offence. Whether or not the suspect is actually impaired is irrelevant.

*Failure to Provide a Breath Sample.* Police officers may request a breath sample from anyone whom they reasonably suspect is operating a motor vehicle while having "alcohol in his body." They may also request a breath sample from anyone whom they have reasonable and probable grounds to believe is, or has been within the last two hours, driving while impaired or driving with a blood alcohol level of more than .08%. Failure to comply with such requests without reasonable excuse, is a criminal offence which carries the same penalties as conviction for driving while impaired or while having a blood alcohol level in excess of .08%.

Although reasonable excuse constitutes a valid defence to a charge of refusing to provide a breath sample, the Criminal Code does not provide a definition of a "reasonable excuse." Thus, the courts have established a number of different situations that will constitute a reasonable excuse. The decision of what constitutes a reasonable excuse is very much dependent on the specific facts of each case.

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\* "average person" means a 70 kg (154 lb) male. A smaller person would metabolize proportionately less alcohol per hour. A 58 kg (128 lb) woman would metabolize slightly more than 4/5 of a standard drink in an hour.

\*\* A standard drink is 43 mL (1½ oz) whiskey or 142 mL (5 oz) table wine or 341 mL (12 oz) Canadian beer.



CRIMINAL CODE DRINKING AND DRIVING OFFENCES

Driving While Impaired

or

Driving While in Excess of .08%

or

Refusing to Provide a Breath Sample

hybrid offences, tried by summary conviction or indictment

	<i>First Offence</i>	<i>Second Offence</i>	<i>Subsequent Offence</i>
Minimum Penalty	Fine \$50	14 days' imprisonment	3 months' imprisonment
Maximum Penalty	Fine \$2,000 and/or 6 months' imprisonment	1 year imprisonment	2 years' imprisonment



## Provincial Alcohol Legislation

Provincial alcohol laws focus on two issues: the regulation of the commercial and retail alcohol trade, and control over the use of alcohol in certain situations. Violations of these statutes are provincial and thus not criminal offences. The following description of Ontario's alcohol laws is provided as an example of provincial legislation . ,

### (i) The Ontario Liquor Control Act and the Ontario Liquor Licence Act

In Ontario, the main body of alcohol legislation is contained in two statutes. The Liquor Control Act sets out the organization of the Liquor Control Board of Ontario and assigns it the power to control the advertising, marketing, sale, transportation, and delivery of liquor. The Liquor Licence Act, empowers the Liquor Licence Board to grant various kinds of licences and permits for the manufacture, sale, and service of alcohol.

The age at which people may legally begin to purchase and consume alcohol is set by provincial legislation and varies from province to province , For example, the Liquor Licence Act of Ontario sets the current minimum age in Ontario at 19. It is a provincial offence, punishable on summary conviction, for anyone under the age of 19 to buy or consume an alcoholic beverage unless it is supplied by the person's parent or legal guardian in the home. Anyone who knowingly sells or supplies liquor to anyone under the minimum age is also guilty of a provincial offence punishable on summary conviction. Employees 18 years of age are allowed to serve liquor, while at work, if they are employed in a licensed establishment in which a permit to sell liquor has been granted. Licences and permits may be revoked or suspended and fines imposed if underaged customers are served. A proof-of-age card may be obtained from the Ministry of Consumer and Commercial Relations with acceptable documentation; the card is used to verify that the holder has attained the legal drinking age. Attempting to obtain a card fraudulently, using a false card, or using someone else's card are provincial offences.

The Liquor Licence Act stipulates that alcohol may only be consumed in a residence or a place for which a licence or permit has been issued. A



residence is defined as a place that is actually occupied and used as a dwelling, whether or not in common with other people. A public place is one to which the general public is invited or permitted access whether or not a fee is imposed. Certainly houses, apartments, and rooms in student dormitories are residences, when occupied as such. Adjacent balconies, porches, lawns, and communal hallways may be considered parts of residences if they are not normally open to the public. Motor homes and boats may constitute residences when suitably equipped and actually occupied as such. When a tent is used as a dwelling, it, and the surrounding campsite, may be considered a residence. However, there are regulations prohibiting drinking in some provincial parks. Cars, boats, vans, and motor vehicles being used for transportation and recreation, rather than as dwellings, are not residences.

Consumption of alcohol in any place other than a residence is legal only if a permit or licence has been issued. The Liquor Licence Act outlines the conditions which must be met in order to obtain a licence or permit to sell or serve alcoholic beverages. There are various classes of licences and many types of special occasion permits. The kind of licence or permit issued depends on the type of service or sale, the kind of premise, and whether food and/or entertainment are provided. Licensed premises are subject to periodic inspection which may result in licence suspension as well as a fine up to \$10,000 and/or up to one year imprisonment for any violation of the Liquor Licence Act or its regulations.

Liquor may only be possessed in a residence or a premise for which a licence or permit has been issued. In any other place, it must be in a closed container and the container must not be displayed to public view. When an alcoholic beverage is being transported in a vehicle or vessel, it must be in an unopened container with an unbroken seal, or in a bottle or package that is packed with personal effects in baggage that is fastened closed or that is not otherwise readily available.

The Liquor Licence Act describes two situations in which a supplier of alcohol may be held liable for injuries or damages resulting from the intoxicated state of a drinker. Anyone is liable who directly, or through



an agent or servant, sells alcohol to people whose condition is such that alcohol might cause or increase intoxication to a point at which they might cause injury to themselves or to the person or property of another. If the drinker causes injury or harm to the person or property of another while intoxicated, the injured party may be entitled to recover damages from the person responsible for supplying the alcohol. The person responsible for supplying the liquor will also be held liable if the person to whom it is supplied commits suicide or meets death accidentally while intoxicated.

In certain additional circumstances, a seller or supplier of alcohol may be held civilly liable for negligence if there exists a special "duty of care" relationship between the seller or provider and the drinker. For example, in one case, the employees of a tavern supplied alcohol past the point of intoxication to a drinker known to them for his propensity for becoming irresponsible after consuming alcohol. When he began to annoy other customers, he was forcibly removed from the premises. On his way home, in the dark, the man was struck by a car and seriously injured. The courts attributed responsibility equally to the injured party, the driver of the vehicle that hit him, and the tavern owner. Factors which were considered important in establishing the special "duty of care" relationship were the tavern employees' awareness of the likelihood of the man becoming irresponsibly intoxicated, their action in forcing him to leave, unaided; and their knowledge that he would have no way of getting home except by hitch-hiking or walking on a fairly busy highway. Whether a court will recognize a special "duty of care" relationship depends on the particular facts of the case in question. However, there seems to be a general trend toward increased responsibility on those who sell or supply alcohol.

## (ii) The Ontario Highway Traffic Act

Provincial traffic legislation provides penalties in addition to those prescribed by the Criminal Code for drinking/driving offences. In Ontario, the Highway Traffic Act, imposes an automatic driver licence suspension on anyone convicted of driving while impaired or while having a blood alcohol level (BAL) in excess of .08% or refusing to provide a breath sample. A licence suspension for three months is automatically imposed for a first



conviction. The first subsequent conviction within a five-year period automatically results in a six-month licence suspension. Any additional convictions within a five-year period results in a three-year licence suspension.

The Ontario government enacted legislation late in 1981 which clarified and broadened a police officer's authority to investigate and take measures against drinking drivers. The legislation requires a motorist to stop when directed to do so by a police officer, who is readily identifiable as such. A motorist who contravenes this provision is guilty of a provincial offence and on conviction is liable to a fine of not less than \$100 and not more than \$2,000 and/or to imprisonment for up to six months. If the driver is also found to have continued to avoid police pursuit his or her licence will be suspended for three years in addition to any other suspension that might be imposed for other violations of the act. Having stopped the vehicle, the officer will then determine whether there is sufficient evidence to demand that the motorist provide a breath sample pursuant to the provisions of the Criminal Code. The legislation empowers the officer to suspend the driver's licence for 12 hours and in certain cases impound the vehicle if the driver: (a) provides a breath sample and registers a warn or higher on a roadside screening device (a warn will be triggered by a BAL of .05% or more); (b) takes a Breathalyzer test and registers a BAL of .05% or higher; or (c) unlawfully refuses to take a roadside screening or Breathalyzer test when demanded to do so. Drivers refusing to provide a breath sample in these situations or registering a BAL of more than .08% on a Breathalyzer will face Criminal Code charges for these crimes in addition to having their licence suspended for 12 hours.

#### IV. RELATED ISSUES

##### Police Powers in Drug and Alcohol Cases

Although police have a duty to enforce the law, they must do so within the limits of the powers granted to them by legislation. Police powers



and the methods to be employed in procedures of arrest, search, and seizure are largely set by statute. Failure to remain within the limits of legal authority could result in a police officer incurring criminal and civil liability. In addition to the extensive general enforcement powers contained in the Criminal Code, other federal statutes and provincial legislation, the Narcotic Control Act, and the Food and Drugs Act provide officers engaged in drug enforcement with extraordinary powers of search and seizure. These special statutory powers were originally enacted to deal with a relatively small number of opiate narcotic users. However, with the sharp rise in cannabis use during the past 15 years, the population subject to these measures has increased accordingly.

Put simply, police officers have far broader powers of search and seizure in a minor drug case, such as simple possession of cannabis, than they have in an investigation for murder or any other serious criminal offence. For example, the Narcotic Control Act and Food and Drugs Act authorize officers to enter and search any place, other than a dwelling, in which they reasonably believe there is a prohibited drug and to search any occupant found therein, using as much force as reasonably necessary. Perhaps the most noteworthy aspect of this provision is that occupants must submit to a physical search in the absence of any evidence, belief, or even suspicion of wrongdoing on their part. The police have invoked this power to enter taverns and to detain and search all occupants. Although such actions are controversial, they have been held to be legal.

Generally, the police can only enter a dwelling if they obtain a valid search warrant issued by a judge. The Narcotic Control Act and Food and Drugs Act, however, contain provision providing for the issuance of writs of assistance which empower their holders to enter and search any dwelling, day or night, in which they reasonably believe there is an illicit drug. Furthermore, in order to prevent the possible destruction of evidence, the courts have permitted the police to enter without any prior announcement, using whatever force is reasonably necessary.

These writs are basically blanket search warrants--they are not limited



as to time or place and are valid for the entire career of the officers to whom they are issued. Once a writ has been issued, the Judge has no control over how or when it is used.

Some provincial statutes set out arrest, search, and seizure powers applicable to offences against their provisions. In Ontario, for example, the Liquor Licence Act and the Highway Traffic Act set out certain conditions under which a police officer may, without a warrant, stop and arrest a suspect to be charged with offences against these Acts. The Liquor Licence Act empowers police to seize liquor which constitutes evidence necessary to prove a contravention of the Act. Police may also seize liquor and packages in which it is kept, if they have reasonable and probable grounds to believe that a further offence is likely to be committed.

If an officer stays within the powers of arrest granted by legislation, the arrest is legal, whether or not the suspect is guilty. Although suspects are required to submit to a legal arrest, they are not legally required to submit to an illegal arrest. However, police powers in drug and alcohol cases are broad and the legality of an arrest frequently rests on the court's interpretation of a complex sequence of events. Since it is often difficult for a layperson to accurately assess the legality of an arrest procedure, any attempt to resist arrest should be exercised with caution. Even though the suspect may honestly believe the arrest to be unlawful, the courts may interpret the facts differently. In such cases, an otherwise innocent suspect could be convicted of resisting arrest or, if the resistance is accompanied by physical force, assaulting a police officer.

#### Adverse Consequences of a Criminal Investigation

Almost any investigation of a private citizen by a police officer is likely to result in a record of some kind. Even if no charge is laid, some official report is likely. Such records may be kept for indefinite periods of time and, in certain cases, may be made available to other enforcement officials. These records are maintained by police and, generally speaking, private citizens have no access to them.



Once a charge is laid, the event becomes a matter of public record. Municipal, provincial, and federal law enforcement agencies, as well as media representatives, may compile and store records of the charge. After an arrest has been made, further investigation is carried out to determine whether or not there is sufficient evidence to proceed to trial. The investigation will also be documented in some manner.

If the subject is charged with an indictable or hybrid offence--which includes all common drug offences--photographs and fingerprints may be taken under the Identification of Criminals Act. This information will be filed as part of the local police department's permanent criminal records. These fingerprints and photographs are routinely forwarded to the RCMPs central record-keeping division in Ottawa where they may be made accessible to domestic and foreign enforcement agencies. These records are maintained even if the charge is later dropped and if the accused is not convicted.

### Sentencing

Although maximum, and for some offences minimum, penalties are set by statute, many factors influence the judge's discretion in choosing an appropriate sentence. A sentence may be imposed for one reason or a combination of them. A primary purpose may be to rehabilitate the offender and prevent a repetition of the offence. A further aim may be to set an example to discourage other members of society from committing a similar offence. Other reasons for imposing penalties may be the need to protect society from further harm and to uphold common values by expressing public disapproval of criminal activity. In passing sentence, the judge may take into consideration the age, previous criminal record, and character, as well as family and social responsibilities of the offender. The circumstances of the offence will also be considered.

#### (i) Absolute and Conditional Discharges

One sentencing option which is available for some criminal offences is the discharge. It may be granted if, in the opinion of the judge, it is in the best



interest of the offender and not contrary to the public interest.

A discharge may be absolute or it may be conditional, requiring that the offender comply with the conditions set out in a probation order. This option is available for those who have been found guilty or pleaded guilty to an offence other than one for which a minimum penalty is imposed or one which is punishable by imprisonment for 14 years up to life. Therefore, given these restrictions, the common drug offences for which a discharge is available are: possession and cultivation under the Narcotic Control Act, and possession, possession for the purpose of trafficking, and trafficking under the Food and Drugs Act.

The discharged offender is deemed not to have been convicted. However, a record of the charge, trial, and discharge will exist and the offender has, for all intents and purposes, a criminal record. Questions such as: "Have you ever been charged with, found guilty of, or discharged for a criminal offence?" must be answered in the affirmative. Also, due to the existence of a record, the discharged offender may not be treated as a first offender in any subsequent criminal proceeding.

#### Effects of a Criminal Record

Anyone convicted of a criminal offence automatically acquires a criminal record which may have far-reaching, sometimes permanent, negative effects on the offender's future.

A criminal record may seriously affect a person's career. Many jobs that involve responsibility for money or goods (for example, certain truck drivers, bank tellers, some sales positions, taxi drivers, security guards) may require that the employee be bonded. Since many companies that bond (insure an employee's honesty) may refuse to bond someone with a criminal record, many jobs may be closed to the offender.

Most of the regulated professions and licensed occupations require that the prospective member meet certain criteria which are assumed to represent



proof of "good character." The possession of a criminal record may be seen as evidence of "unprofessional," "dishonorable," or "improper" conduct which could exclude the offender from the profession or occupation. Professional groups for which these criteria may apply include accountants, architects, doctors, and other health professionals, engineers, and lawyers. Some of the licensed occupations which may be subject to similar requirements are: ambulance drivers, auctioneers, dental technicians, funeral directors, police officers, psychologists, real estate agents, veterinarians, and operators of nursing homes, taverns, private hospitals, and private vocational schools. Teachers' careers may be seriously affected if school boards adopt a policy of not hiring or dismissing teachers who have a criminal record.

A criminal record may seriously limit the offender's future mobility. Entry to Canada for travel or immigration may be denied on the basis of the applicant's criminal record. A criminal conviction could, theoretically, result in the deportation of a visitor or immigrant to Canada. Entry to other countries for travel or immigration may also be denied to those with a criminal record.

In addition, anyone with a criminal record will be at a serious disadvantage in any subsequent criminal proceedings. Also, sentencing or parole decisions for any subsequent conviction may take into account the offender's previous record.

### Pardons

The recognition of the far-reaching, punitive consequences of having a criminal record has led to attempts to mitigate its effects. The federal Criminal Records Act provides that a convicted or discharged offender may apply for a pardon. The statute specifies the length of time which must elapse after disposition of the case, payment of a fine, or completion of a sentence before a pardon application may be submitted. This period is intended to permit time for the offender to be rehabilitated. During the investigation of the pardon request, the offender's family, friends, neighbors,



and employer may be interviewed.

If a pardon is granted, it will have a limited impact. The offender's record for that particular criminal offence, held by federal agencies, will not be destroyed but will be sealed and stored separately. Information about the offence for which the pardon was granted may be released only with the Solicitor General's consent. The Criminal Records Act, by which pardons may be granted, applies only to records held by federal authorities. Therefore, provincial and municipal authorities are not obliged to separately store or limit release of their records. Similarly, media records or other documents accumulated by police agencies will not necessarily be affected by a pardon.

Concern about the sealing of records may be somewhat misplaced since a pardon will not wipe out a criminal record. Nor does a pardon expunge the offence. Thus, pardoned offenders should answer "yes" if asked whether they have a criminal record. Qualifying the answer by adding that a pardon has been granted may have some ameliorating effect.

#### Juvenile Delinquents Act

The federal Juvenile Delinquents Act provides that any child who violates a provision of the Criminal Code, any other federal or provincial statute or municipal by-law, or who is guilty of sexual immorality or any similar vice may be charged with committing the offence of delinquency. In Ontario, "child," for the purpose of this Act, generally means any boy or girl, actually or apparently under the age of 16.

The purpose of this Act is to allow the courts to treat the offender as being in a state of delinquency and in need of care, custody, and discipline, rather than as a criminal. Emphasis is placed on redirection and rehabilitation rather than punishment. However, being found to be a delinquent does constitute a summary conviction federal criminal offence. Thus, a child found to be a juvenile delinquent acquires a criminal record.



If a child, actually or apparently over the age of 14 is charged with an indictable offence, the judge, in certain circumstances, may order that the case be tried in adult court. This option may be exercised only if the judge determines that the interests of the community and the child warrant it.

### Concerns of Parents and Teachers

Generally, it is the responsibility of the police, not private citizens, to enforce the law. A person who knows of someone else's illegal activity is not usually required to report such knowledge to the police. Whether or not one should inform the police of others' criminal activity is usually a moral or ethical decision rather than a legal one. The issue becomes more complex, however, if the illegal activity is committed by a child. The Juvenile Delinquents Act sets out the offence of contributing to delinquency. Anyone who knowingly or willfully aids, causes or abets, or connives at the commission by a child of a delinquency, or who does any act producing, promoting, or contributing to the delinquency, or who is likely to make a child become a delinquent may be found guilty of this offence. Persons of any age, whether or not they are parents or guardians of the child, may be charged with contributing to delinquency. Further, any parent or guardian who, being able to do so, knowingly neglects to do that which would directly tend to prevent a child from being or becoming a delinquent, may be found guilty of an offence against this Act.

Parents, teachers, and counselors who find out that a child is involved in illegal drug use, frequently wonder about their rights and duties in respect to the child. It is important to distinguish carefully between recognizing, as opposed to encouraging, illegal activity. The fact that one has knowledge of a child's illegal activity will not generally create a legal responsibility to inform police. An appropriate response to learning of such activity requires a consideration of the moral and ethical responsibility to the child and others who may be involved. Whether the person should intervene will probably depend more on the danger inherent in the activity and the personal responsibility in the relationship than on any legal issue.



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APR 6 1986

APR 7 1992 LAW

APR 24 1992 LAW

MAR 21 1993 LAW

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